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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY
a division of
KNIGHT NEWSPAPERS, INC., *Appellant*,

v.

PAT L. TORNILLO, JR., *Appellee*.

On Appeal from the Supreme Court of Florida

BRIEF OF THE WASHINGTON POST COMPANY, AMICUS CURIAE, IN SUPPORT OF REVERSAL

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D. Balmer, State Election Services in Oregon (1972) (Citizen's Research Foundatiton, Princeton, N.J.) 24
2 Z. Chafee, Government and Mass Communications (1949) 16-17, 18
4 Elliot's Debates (1836) 12-13
T. Emerson, The System of Freedom of Expression (1970) 49
Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967) 55, 56
J. Milton, Aeropagitica (1644) 44
Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964) 55
J. Schumpeter, Capitalism, Socialism and Democracy (1943) 37

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BRIEF OF THE WASHINGTON POST COMPANY, AMICUS CURIAE, IN SUPPORT OF REVERSAL

The Washington Post Company, a Delaware Corporation, submits this brief as *amicus curiae* in support of appellant's appeal from the judgment of the Supreme Court of Florida, entered on July 18, 1973, rehearing denied, October 10, 1973. Both parties to this action have given their written consent to the filing of this brief pursuant to Supreme Court Rule 42(1). Copies of letters of consent have been filed with the Clerk and are appended to this brief.

OPINION BELOW

The opinion of the Florida Supreme Court is reported at 287 So. 2d 78 (1973). The opinion of the Circuit Court of Dade County, which the Florida Supreme Court reversed, is reported at 38 Fla. Supp. 80 (1973).

JURISDICTION

The judgment of the Florida Supreme Court was entered on July 18, 1973. A Petition for Rehearing was denied by that court on October 10, 1973. A jurisdictional statement was filed on November 19, 1973. On January 14, 1974 this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Florida Statutes § 104.38 provides:

> "§ 104.38 Newspaper assailing candidate in an election; space for reply.—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon re-

quest of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083."

QUESTIONS PRESENTED

1. Whether, under the First Amendment, whenever a newspaper has criticized a candidate for public office, a State may compel the newspaper to print, without the exercise of any editorial control and free of charge, a reply to the criticism submitted by the candidate.

2. Whether a statute requiring a "newspaper" which "assails" the "personal character" of any "candidate" for public office or "attacks his official record" to print "any reply" that is "responsive" to the criticism is unconstitutionally vague under the First Amendment and the Due Process Clause of the Fourteenth Amendment.

3. Whether a statute which requires a newspaper to make space in its columns available free of charge to a class of persons designated by the statute takes the newspaper's property without compensation in violation of the Due Process Clause of the Fourteenth Amendment.

INTEREST OF THE AMICUS

The Washington Post Company is the publisher of *The Washington Post*, a daily newspaper, published in the Nation's capital. In addition, The Washington

Post Company is the parent of subsidiary corporations including Post-Newsweek stations which operate WPLG-TV in Miami, Florida and WJXT-TV in Jacksonville, Florida. The Washington Post Company through a subsidiary also publishes *Newsweek*, a nationally and internationally distributed news magazine.

STATEMENT

Appellee Pat L. Tornillo, leader of the Dade County Classroom Teachers Association, was a candidate for the Democratic Party's nomination to the Florida House of Representatives in a run-off election in the fall of 1972. On September 20, 1972 and September 29, 1972, *The Miami Herald* published editorials relating to Tornillo's candidacy.

On September 20, 1972, apparently for the second time, Tornillo submitted his own reply to the editorials and requested that *The Miami Herald* print it verbatim and free of cost, pursuant to § 104.38, Florida Statutes. *The Miami Herald* did not print the reply. Tornillo did not request a retraction under § 770.02, Florida Statutes, nor did he claim that the editorials were false or libelous.

On October 1, 1972, Tornillo filed a civil action in the Circuit Court for Dade County, Florida seeking declaratory relief, a mandatory injunction directing *The Miami Herald* to publish his reply, and damages. The Complaint did not allege that any statement in the published editorials was false or defamatory or was published with knowledge of falsehood or reckless disregard for truth. The Complaint merely alleged that the editorials assailed Tornillo's personal character and that they contained "willful, intentional, deliberate

and malicious attacks" upon him. *The Miami Herald* contended that § 104.38 is unconstitutional. The Circuit held an emergency hearing on October 2, 1972. The Attorney General of Florida was notified of the suit pursuant to § 86.091, Florida Statutes, requiring notice of any action in which a statute is alleged to be unconstitutional; and he was represented at the hearing.

The Attorney General advised the Circuit Court that because he doubted the constitutionality of § 104.38, he had refused to appeal from a prior decision holding it unconstitutional. That case, *State* v. *News-Journal,* 36 Fla. Supp. 164 (Volusia Cty. Judges Ct. 1972), apparently was the first brought under § 104.38 since its enactment in 1913. In the instant case the Florida Attorney General declined to defend § 104.38.

The Circuit Court dismissed the Complaint, holding § 104.38 invalid under the First Amendment and void for vagueness under the First and Fourteenth Amendments.

On appeal, the Florida Supreme Court reversed, one Justice dissenting.

SUMMARY OF ARGUMENT

Florida Statutes § 104.38 violates the First Amendment, which prohibits government at every level from dictating to the press what it must print. The claim that a state may, consistently with the First Amendment, tell a newspaper what to print is alien to our history and our law. In several recent cases this Court has reaffirmed the fundamental axiom that, with marginal exceptions, the freedom of the press means the freedom of every publisher of ideas to exercise, free from governmental control, his own independent edi-

torial judgment as to what ideas he will and what ideas he will not publish.

A governmental right to tell the press what to print presupposes governmental powers wholly inconsistent with a free and independent press. It presupposes governmental power to directly structure public debate and to control the direction of public attention. It also presupposes governmental power to decide what is newsworthy and, ultimately, to determine what information is effectively communicated to the public.

Governmental dictation of what newspapers must print would compromise their editorial integrity and destroy their independence. It would transform the press into agents and servants of government, certainly not the relationship contemplated by the Framers. It would also diminish the diversity among newspapers and deprive them of control over the quality of their product. Inclusion of required material may entail exclusion of other material and thereby operate as a prior restraint. In addition to its loss of editorial freedom, a newspaper is economically burdened when it is compelled to print material free of charge.

Section 104.38 abridges press freedom in all these ways. Moreover, in actual operation it will provide wholly inadequate procedural protection to newspapers' First Amendment interests, by subjecting them to the virtually unreviewable discretion of state trial judges acting on motions for temporary mandatory restraining orders and preliminary mandatory injunctions. Section 104.38 cannot be defended as granting only a narrow right of reply because during a political campaign candidates' rights of reply will consume massive proportions of newspaper space.

If a state seeks to educate its electorate, it can do so by means far less restrictive of First Amendment rights. A state can itself publish and distribute campaign materials, as Oregon and other states have in fact done. It can appropriate funds to purchase newspaper advertisements devoted to campaign materials. A state may also communicate information to the public by involving it in a news event which the press as a matter of course will cover.

There may be extreme circumstances of national emergency which would justify a government order to the press to print something, but no such circumstances are present here.

Section 104.38 does not merely tell the press what it must print. It also unconstitutionally penalizes protected speech. A newspaper is subject to the statutory obligation to print only if it has criticized a political candidate. Such criticism is not merely protected speech, but is at the core of First Amendment protection. A newspaper attack on a political candidate loses its First Amendment protection only if it is false and published with actual malice in the constitutional sense. No such limitation is incorporated in § 104.38, and the Complaint in this case did not even allege that any statement published by *The Miami Herald* was false or published with actual malice.

Thus § 104.38 imposes criminal and civil sanctions for engaging in protected speech and then failing to print a reply to such speech. Even truth, which was a defense under the Sedition Act of 1798, is no defense to § 104.38. Moreover, the more space a newspaper devotes to criticism of a candidate, the more it must yield to a reply. During a political campaign, large

segments of its front page and editorial page will be usurped for this purpose. Since replies must be printed free of charge, § 104.38 in effect imposes a tax on political criticism. The tax goes to the criticized candidate in the form of a free right to reply. This tax on newspapers is irrational and discriminatory and therefore violates the First Amendment. Because of these sanctions, the ultimate effect of § 104.38 will be to discourage newspaper criticism of political candidates.

Section 104.38 serves no compelling state interest. The free marketplace of ideas is alive and functioning well, and does not warrant state intervention. Political candidates, as a class, have more than ample access to the media. Campaign coverage is not limited to newspapers, but is carried by radio and television stations, local and national magazines, labor union, corporate, and other organizational publications, and the communications media established by candidates and their staffs.

The decline in the number of large metropolitan daily newspapers with general circulation has no First Amendment significance in view of the vast expansion of the marketplace of ideas through other media—radio, television, CATV, magazines, "underground" newspapers, organizational publications, and many others. The decline of large metropolitan newspapers reflects only the process of "creative destruction" which goes on regularly in any healthy and competitive market as sellers respond to changes in technology and consumer preferences.

Certainly not every new idea or point of view commands an immediate mass audience. But the First Amendment contemplates that new ideas must *earn*

such an audience through the self-help of their proponents and through competition with other ideas.

Section 104.38 seeks to vindicate reputation, not to promote public debate. It helps only those candidates who have attracted sufficient attention to warrant a newspaper attack. It does nothing for a candidate struggling in total obscurity. It provides for a reply even if the newspaper has already printed all that can be said in the candidate's defense. But it provides for no reply if the newspaper, instead of criticizing the candidate, misrepresents his positions on the issues or strongly endorses his opponent. The statute applies to all candidates, not just to those (if any) who may really need government help to obtain access. And it discriminates in favor of incumbent candidates by applying to attacks on official record but not to attacks on conduct in an unofficial capacity.

Section 104.38 is not analogous to a retraction statute. Retraction statutes apply only to speech that is false, defamatory and published with actual malice. The scope of § 104.38 is not so limited. Retraction statutes do not require the press to print anything: they merely provide that *if* a reply is printed, damages are reduced in some way. Thus, they do not interfere with the independence of the press, as § 104.38 does.

The premises of the fairness doctrine in broadcasting have no application to the print media. Technological considerations unique to broadcasting require governmental licensing of broadcasters. Where government creates and grants a monopoly, the recipient may be required to exercise his monopoly power fairly with respect to those excluded from the power and those affected by it. The fairness doctrine in broadcasting

is a product of this principle. As to the print media, no technological considerations can possibly justify a licensing system. No private printer enjoys a government granted monopoly. Accordingly, there is no basis for application of a fairness doctrine to the print media.

Approval of §104.38 would not promote free debate, but restrict it. Government imposed requirements of "fairness" might destroy publications whose success depends on appeal to an audience with a particular point of view. All publications would have a strong incentive to blunt their political criticism and confine it to the smallest possible space.

Section 104.38, a statute with criminal and civil sanctions, is unconstitutionally vague. The statutory terms "candidate," "assails the personal character," "charges . . . malfeasance or misfeasance in office," "attacks . . . official record," "newspaper," and "reply" are all vague and of uncertain scope. There is no adequate means for removal of this vagueness.

Section 104.38 takes a newspaper's property without compensation, and thereby denies due process of law. The statute works a physical invasion and occupation of newspaper property having significant economic value—space in its columns. This taking is not an incidental consequence of a generally valid regulation—it is the specific purpose of the statute. Section 104.38 is not directed at any "noxious" use of private property. It totally destroys the economic value of the property it affects. If the statute serves a public purpose, the cost of achieving that purpose should fairly be borne by the public (or by the candidates most particularly benefitted), not by newspapers.

ARGUMENT

I. FLORIDA STATUTE § 104.38 VIOLATES THE FIRST AMENDMENT

A. INTRODUCTION.

Florida statutes § 104.38 applies to a newspaper whenever "in its columns" it (1) "assails the personal character of any candidate for nomination or for election in any election," or (2) "charges said candidate with malfeasance or misfeasance in office," or (3) "otherwise attacks his official record," or (4) "gives to another free space for such purpose." These four categories will be referred to collectively herein as "attacking" a candidate.

Where § 104.38 applies, it requires the newspaper, subject to criminal and civil sanctions,[1] to print "immediately" a reply submitted by the candidate attacked. For his reply the candidate is entitled under § 104.38 to space that is equal in prominence and quantity to the space occupied by the attack, and he is entitled to have his reply printed in type of equal size. The newspaper must print the reply without charge.

For purposes of First Amendment analysis, two features of § 104.38 are critical. First, the statute re-

[1] The statute, in terms, provides only for criminal sanctions. Tornillo sued civilly for an injunction and damages. The trial court held that it could not enjoin a violation of the statute, and the Florida Supreme Court agreed. However, the Florida Supreme Court did not discuss whether a mandatory injunction would be an appropriate remedy once a newspaper has violated the statute by failing to print a reply "immediately." The Court also did not address itself to the appropriateness of a damage remedy. Nevertheless, in reversing the dismissal of the Complaint and remanding for further proceedings, the Court must have assumed that some civil remedy is available for violation of § 104.38.

quires newspapers to publish material which, as a matter of editorial judgment, they may want to reject. Second, whether the statutory sanctions apply depends entirely on the content of the newspaper: a newspaper must print a candidate's statement only if it has published an attack upon him.

In part B, *infra,* we show that any law providing that newspapers must publish certain material in their editorial or news columns is an unconstitutional invasion of the editorial freedom of the press, which no state interest can justify. In part C, *infra,* we show that this unconstitutionality is seriously aggravated when the provision for access is so designed as to regulate the *content* of a newspaper by attaching a penalty to criticism of political candidates. We also show that §104.38 is so designed. In part D, *infra,* we show that § 104.38 does not serve any valid purpose sufficient to justify the restraints on the press which it imposes.

B. THE FIRST AMENDMENT PROHIBITS GOVERNMENT FROM DICTATING TO THE PRESS WHAT IT MUST PRINT.

In the entire jurisprudence of this Court, it has never, before this case, been suggested that the First Amendment permits government to compel a newspaper to print something, under pain of criminal and civil sanctions. The assertion of any such power is alien to our national history as well as to our law. At the turn of the 19th Century, when there was general concern about the "abuses" of the press, particularly in its attacks upon public men, those who argued for some countervailing protection relied on the law of libel. The great question at that time was whether the First Amendment permitted the survival of the English common law of seditious libel. See 4 Elliot's Debates

528-82. Had anyone suggested that a government subject to the First Amendment could remedy the abuses by the press by compelling the publication of retractions, replies, or other materials,[2] the broad and decisive answer was given by Madison:

> "In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . . .
>
> "Is, then, the federal government, it will be asked, destitute of every authority for restraining the licentiousness of the press, and for shielding itself against the libellous attacks which may be made on those who administer it?
>
> "The Constitution alone can answer this question. If no such power be expressly delegated, and if it be not both necessary and proper to carry into execution an express power; above all, if it be expressly forbidden, by a declaratory amendment to the Constitution,—the answer must be, that the federal government is destitute of all such authority." 4 Elliot's Debates 570, 572-73.

The absence from our constitutional history of any claim of government power to compel the press to

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[2] Mr. Justice Douglas has noted that Benjamin Franklin strongly rejected the view that he was under an obligation to open the pages of his paper to all controversialists. *CBS* v. *Democratic National Committee*, 412 U.S. 94, 152 (1973) (concurring opinion). It is not clear that any proponent of such an obligation thought it was legally enforceable, or that it could be enforced by a government subject to the restrictions of the First Amendment. The First Amendment at that time did not apply to the States.

print reflects a fundamental First Amendment axiom. That axiom is that, with marginal exceptions,[3] the freedom of the press means the freedom of every publisher of ideas to exercise, free from governmental control, his own independent editorial judgment as to what ideas he will and what ideas he will not publish.

In three recent cases this Court has restated the fundamental axiom. In *Pittsburg Press Co.* v. *Pittsburg Comm'n on Human Relations,* 413 U.S. 376, 391 (1973), the Court, per Mr. Justice Powell, explained:

> "Nor *a fortiori,* does our decision authorize any restriction whatever, whether of content of layout, on stories or commentary originated by the Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."

See also 413 U.S., at 393-97 (Burger, C. J., disenting); 413 U.S., at 397-99 (Douglas, J., dissenting); 413 U.S., at 400 (Stewart, J., joined by Douglas, J., and expressing the view of Blackmun, J., dissenting) ("[T]he question . . . is whether any government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot. Under the First and Fourteenth Amendments I think no government agency in this nation has any such power."). Similarly

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[3] *E.g.,* fighting words, *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942); obscenity, *Miller* v. *California,* 413 U.S. 15 (1973); libel with actual malice, *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); and speech presenting a clear and present danger of imminent injury to a vital public interest, *Schenck* v. *United States,* 249 U.S. 47 (1919).

in *Cohen* v. *California,* 403 U.S. 15, 24 (1971), the Court, per Mr. Justice Harlan, stated:

> "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."

In *CBS* v. *Democratic National Committee,* 412 U.S. 94 (1973), all the Justices who addressed the point agreed that the fundamental axiom applies to the print media. The Chief Justice wrote for himself, Mr. Justice Stewart and Mr. Justice Rehnquist:

> "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers." 412 U.S., at 117-18.

As Mr. Justice Stewart expressed it, the First Amendment "gives *every* newspaper the liberty to print what it chooses, free from the intrusive editorial thumb of Government." 412 U.S., at 145 (concurring opinion) (emphasis in original). Mr. Justice Douglas was of the same view. See 412 U.S., at 150-52 (concurring opinion). Even Mr. Justice Brennan and Mr. Justice Marshall, who, in dissent, thought there is a First Amendment right of access to the broadcast media,

agreed that the First Amendment not only does not create a right of access to the privately owned print media, but also prohibits government from regulating the print media so as to create such a right. 412 U.S., n.12 at 182 (dissenting opinion). See also *Thomas* v. *Collins,* 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.").

The reasons for the fundamental axiom and for these judicial statements are inherent in the system of freedom of expression ordained by the First Amendment. The Amendment established a system in which all persons and groups of persons have a right to publish information and opinions as they choose, and in whatever form they choose. "The theory of our Constitution is that every citizen may speak his mind and every newspaper express its views on matters of public concern . . . ." *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 299 (1964) (Goldberg, J., concurring). Government is barred from prohibiting or requiring the expression of opinion, or the communication of information, on matters of public concern. Professor Chafee has pointed out that "there is no bright line between encouragement and repression," 2 Z. Chafee, Government and Mass Communications, 710 (1949):

> "Whenever anybody is inclined to look to the government for help in making the mass media do what we desire of them, he had better ask himself one antiseptic question: "Am I envisaging myself as the official who is going to administer the policy which seems to me so good?" Justice Holmes remarked that, when socialism came, he hoped he would be "on the committee". You and

> I are not going to be on the committee which is charged with making newspapers or radio scripts better written and more accurate and impartial. It is very easy to assume that splendid fellows in our crowd will be exercising the large powers over the flow of facts and opinions which seem to us essential to save society, but that is an iridescent dream. We must be prepared to take our chances with the kind of politicians we particularly dislike, because that is what we may get." *Id.*, 709.

The system of free expression is a regime of laissez faire protected by the First Amendment from the heavy hand of government intrusion. This zone of freedom is protected against four principal types of intrusion: against prior censorship, *e.g.*, *Near* v. *Minnesota*, 283 U.S. 697 (1931); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); against subsequent sanctions against protected speech, *e.g.*, *New York Times Co.* v. *Sullivan*, *supra*; *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Speiser* v. *Randall*, 357 U.S. 513 (1958); against discrimination, *e.g.*, *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); and against government dictation of what must be printed. Though our history provides no experience of government dictation to the press, its evils are readily apparent on analysis.

A governmental right to tell the press what to print presupposes governmental powers wholly inconsistent with a free and independent press. In dictating to a newspaper what it must print, government asserts either a power to determine what is newsworthy, or a power to decide what (or whose) editorial views are to be expressed. Since § 104.38 in terms applies to all

the "columns" of a newspaper, including both news and editorial columns,[4] it follows that Florida asserts both powers. And both strike at the heart of freedom of the press.

If government had the power to dictate to a newspaper what material it shall print in its news columns, it would have the power directly to structure public debate and to control the direction of public attention. Except for the power to censor, no governmental power could be more inconsistent with the First Amendment than this. If government were ever permitted under our Constitution to decide that this event deserves more press coverage than that, or that this man's statements should be covered more fully, regardless of what other matters are competing for space and prominence, freedom of the press as we have known it would end. For a newspaper can adequately report events only by making complex judgments of relative newsworthiness. If government ever is permitted to make these judgments, it and not the press will have the ultimate power to determine what information is effectively communicated to the public. As Zechariah Chafee wrote:

> "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper. A journal does not merely print observed facts the way a cow is photographed through a plate-glass window. As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression." 2 Z. Chafee, Government and Mass Communications 633 (1949).

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[4] The Florida Supreme Court pointedly held that under § 104.38 a newspaper must print a reply responsive to "the charge made in the *editorial or other article* in the newspaper being replied to." (Emphasis added).

Similarly intolerable consequences would follow if government had the power to direct that certain editorial views or the editorial views of certain persons be printed, even in the interest of "fairness." By exerting its coercive power directly on the expression of editorial opinion, the government would be arrogating to itself a power to direct the formation of public opinion. "Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a governmental bureaucracy to accomplish. History has many times confirmed the wisdom of their choice." *CBS* v. *Democratic National Committee, supra,* at 145-46 (Stewart, J., concurring).

In *CBS* v. *Democratic National Committee, supra,* at 124-25, this Court wrote:

> "Nor can we accept the . . . view that every potential speaker is 'the best judge' of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt .... Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression."

Editing of newspapers is the function of editors. It is not the function of government, or of political candidates or other persons designated by government.

Government dictation of what a newspaper must print would compromise the newspaper's integrity, and destroy its independence. Under § 104.38, for example, newspapers become mouthpieces for persons designated by government. To the extent that newspapers must print materials specified by such persons, they become agents and servants of government, carrying out government's will by publishing to the public materials that government commands shall be published. That is the relationship between press and government in totalitarian countries, where much of the content of newspapers is government-ordained propaganda. It is not the relationship contemplated by the Framers. Our Constitution established between government and the press a relationship of mutual independence and tension: as Mr. Justice Black wrote in *New York Times Co.* v. *United States,* 403 U.S. 713, 717 (1971):

> "In the First Amendment the Founding Fathers gave the press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government."

See also the quotation from James Madison at p. 13, *supra*; *Mills* v. *Alabama,* 384 U.S. 214, 219 (1966). The great tradition of the free press in America lies in its total independence from government, not in subservience to government.[5]

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[5] As the court stated in *Resident Participation of Denver, Inc.* v. *Love,* 322 F. Supp. 1100, 1105 (D. Colo. 1971), "[T]he historic function of newspapers, like the pamphlets of a prior day, has been to oppose government, to be its critic not its accomplice."

Every responsible news publication manifests its own editorial integrity. Each develops and applies its own approach to reporting, analyzing and commenting upon the news. Readers of publications as diverse as, say, *The Washington Post,* the *New York Daily News, The Wall Street Journal, TIME,* and the *Berkeley Barb* expect quite different editorial products from them. They expect different types of news reporting,[6] editorial opinion, and literary style. A requirement by government that publications such as these print particular materials would destroy their editorial integrity, and diminish the uniqueness of each and the diversity among them, thereby reducing the choices available to consumers of news and opinion.

A government requirement to print would also deprive the press of quality control over the materials that must be printed. The editors of every responsible news publication apply to the articles they publish standards of newsworthiness, factual accuracy, objectivity, fairness, and literary quality. They do not voluntarily fill their pages with articles on subjects that have no news value or that are inaccurate or misleading, biased, unfair, or poorly written. And yet, if required by law to print materials designated by government, newspapers may have to admit such articles into their publications. For example, if newspapers are required to print candidates' statements verbatim, without editorial control, they are likely to find their pages crowded with press releases and other turgid campaign pap.

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[6] *E.g.*, investigative reporting, muckraking, advocacy journalism, "straight" or "objective" reporting, summary or comprehensive reporting.

A requirement to print burdens the press in other ways. Inclusion of the required material may, as a practical matter, entail exclusion of other material, and thereby operate as a prior restraint. This consequence is particularly aggravated in the case of § 104.38, where the statute in some circumstances requires that material be printed in a particularly limited space, such as the front page or the editorial page. In the instant case, the replies would have to be printed on the editorial page or in other space deemed "equally conspicuous." Where, as in the case of § 104.38, the requirement is that the material be printed without charge, the newspaper bears the economic cost of publication.

Section 104.38 abridges editorial freedom and otherwise burdens the press in all these ways. It does so even though its enforcement does not require an administrative agency. Although this particular statute does not inflict on the press a host of administrative copyreaders, it does subject the press to an enforcement procedure that does not sufficiently protect its First Amendment interests. The statute avoids the creation of an administrative agency to oversee the press only by placing the entire administrative burden on the courts and by leaving much of its practical operation shrouded in vagueness. As a practical matter, during the heat of political campaigns, § 104.38 will be administered by a host of individual state trial judges exercising virtually unreviewable discretion to grant or deny temporary mandatory restraining orders and preliminary mandatory injunctions. That is the setting of the instant case, which reached the appellate stage only because of the persistence of Mr. Tornillo and, presumably, his claim for damages. Once a viola-

tion occurred and to remedy it a trial judge ordered the printing of a reply "immediately" in accordance with § 104.38, a newspaper could obtain appellate review only by risking contempt. The statutory term "immediately" seems to leave no room for stays. A statute which thus imposes undue procedural burdens on First Amendment claims is unconstitutional for that reason alone. See *Speiser* v. *Randall,* 357 U.S. 513 (1958). Moreover, if § 104.38 is upheld, there would be nothing to prevent Florida from "improving" its administration by establishing an agency to look over the press' shoulder and render advisory opinions or even mandatory orders. The vagueness of § 104.38 is discussed at pp. 52-55, *infra.*

Nor can § 104.38 be defended as granting only a very narrow right of reply—to political candidates rather than to the public at large. A candidate's right to reply to every criticism published by a newspaper during a political campaign will consume massive proportions of a newspaper's space—particularly, under § 104.38, space on the first few pages and the editorial page. See pp. 31-32, *infra.*

The fact that government compulsion to print would invade the freedom of the press so substantially is not the full explanation of either the First Amendment's prohibition of such compulsion or its total absence from our history. The rest of the explanation lies in the availability of ready alternatives to carry out whatever governmental policies may be furthered by compulsion to print. Such alternatives are far less restrictive—or not restrictive at all—of First Amendment rights.

If government wants to communicate information to the people, it can publish the information itself. The

federal government has its own printing office. This Court itself publishes three or four volumes every year. All of the states publish a wide variety of documents and other materials. If a state wants to promote the political education of the electorate, it can publish and distribute materials relevant to a campaign, including candidates' statements, as Oregon and other states have in fact done.[7]

If a state for some peculiar reason wants particular materials to reach the readership of a particular newspaper, it can appropriate funds to buy an advertisement in that newspaper. Although a newspaper may not under the First Amendment be compelled to accept an article, *Avins* v. *Rutgers,* 385 F.2d 151 (3rd Cir. 1967), cert. denied, 390 U.S. 920 (1968), or an advertisement, *Chicago Joint Board ACWA* v. *Chicago Tribune Co.,* 435 F.2d 470 (7th Cir. 1970) cert. denied 402 U.S. 973 (1971); *Associates & Aldrich Co.* v. *Times Mirror Co.,* 440 F.2d 133 (9th Cir. 1971); *Opinion of the Justices,* 298 N.E.2d 829 (Mass. 1973),[8] it may do

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[7] D. Balmer, State Election Services in Oregon 21 (1972) (Citizen's Research Foundation, Princeton, N. J.).

[8] There the Supreme Judicial Court unanimously held unconstitutional a proposed statute that would have imposed a fairness doctrine with respect to paid political advertisements in newspapers. Under the bill, any newspaper which had accepted a paid political advertisement with respect to any candidate for public office or any measure to be voted on was required to accept all other advertisements relating to any other candidate for the same office or to other views on the measure to be voted on. This statute was far less offensive to the First Amendment than § 104.38 since (i) it required only the printing of an advertisement, not of a reply to a news article or editorial, and so did not intrude upon a newspaper's news coverage or expression of editorial opinion; (ii) the obligation to print was triggered only by the printing of an advertisement and not by criticism of a candidate in a news

so voluntarily to serve the public interest and its own economic interest. For example, if a state wants to assure that newspaper readers receive enough campaign information to make an intelligent voting decision, it can purchase advertising space in newspapers and fill the space with candidates' statements and other relevant material. Certainly, before resorting to compulsion against the press to achieve its purposes, a state must exhaust the possibilities for achieving them through voluntary agreement.

Government may also communicate information to the people by involving it in a news event which the press as a matter of course will report. The public statements of high officials at every level of government (local, state and federal) are routinely reported by newspapers. Since, as a practical matter, significant official statements are always reported, government never finds it necessary to resort to compulsion. This consideration applies with equal force to the asserted purpose of § 104.38, to inform the public adequately about candidates for public office. Among all the criticisms made of newspapers, one never (or almost never) hears it said that they fail to give sufficient coverage to political campaigns or to the statements of political candidates. Indeed, political candidates, as

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article or editorial, so that the statute did not chill the publishing of criticism of candidates in news articles or editorials; (iii) the statute did not require that the reply advertisements be printed in any particular place in the newspaper, and so did not interfere with editorial judgment as to relative newsworthiness or layout; and (iv) the statute required the printing only of reply advertisements that were paid for. Nevertheless, the court found that the statute was not supported by any compelling state interest, and that under the decisions of this Court no circumstances could justify a legislative mandate that a newspaper publish a political advertisement.

a class, have a highly developed talent for giving their actions and statements news value; and as a result they in fact receive very heavy coverage by newspapers and other news media. In the absence of any showing by Florida that there is a pressing public need to compel newspapers to print candidates' statements because the press does not otherwise report them sufficiently, §104.38 is a totally unjustified invasion of the freedom of the press.

It may be that one could imagine extreme circumstances of national emergency and near total breakdown of communications where government would have a sufficient interest to justify ordering the press to print certain vital information needed by the public. Such situations would be analogous in their rarity to situations where the government may impose censorship. See *Near* v. *Minnesota,* 283 U.S. 697, 716 (1931) (to prevent "the publication of the sailing dates of transports or the number and location of troops"). Plainly, no such circumstance is even arguably presented in the instant case.

Finally, no prior decision of this Court supports the view that a state may dictate to a newspaper what it must print in its news and editorial columns. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), and *CBS* v. *Democratic National Committee,* 412 U.S. 94 (1973), both involved regulation of broadcasting rather than of any print medium. In each case the Court was careful to state that its decision was based on the unique characteristics of broadcasting and in no way affected the rights of the print media. See 395 U.S., at 386-90; 412 U.S., at 101. The distinctions between the print and broadcast media are fully discussed at pp. 43-49, *infra.*

Pittsburgh Press Co. v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376 (1973), also did not involve any assertion of governmental power with respect to news or editorial columns. The Court there sustained an order that a newspaper not use sex-designated headings for help-wanted advertisements in its classified advertising section. The Court emphasized that the administrative order upheld did not in any way burden protected speech, 413 U.S., at 388-89, 390, and that its own decision did not authorize any regulation of the news or editorial content of a newspaper, 413 U.S., at 391.

Associated Press v. *United States,* 326 U.S. 1, 20 (1945), involved an antitrust attack on a newspaper association's group boycott of nonmembers, which prevented them from obtaining news. This Court sustained the attack against First Amendment challenge on the ground that the First Amendment does not protect private conspiracies to censor the dissemination of news. From the fact that government may enjoin concerted refusals to deal, it does not follow that it may affirmatively require the press to print certain information or opinions. The Court's opinion in *Associated Press* did not remotely suggest that a single newspaper acting alone and in full compliance with all laws could be required by government to print something it did not wish to print.

The public forum cases, *e.g., Marsh* v. *Alabama,* 326 U.S. 501 (1946); *Amalgamated Food Employees* v. *Logan Valley Plaza,* 391 U.S. 308 (1968), involved property already dedicated to the kind of public use for which a right of access was being asserted. Where property is not so dedicated, this Court has held there is no right of access. *Adderley* v. *Florida,* 385 U.S. 39

(1966); *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972). A privately-owned newspaper is not a public forum. It is one participant among many in a public forum embracing all media of communication, see pp. 34-39, *infra.* A newspaper is not dedicated to public use beyond the editorial control of its management.[9] Certainly no argument could possible be made that *The Miami Herald* or any other newspaper has dedicated its news or editorial pages to public use. Rather, under the First Amendment, a newspaper has an unfettered right to express its own interpretation and opinion of the news, and government may no more compel it to express the views of someone else than it may compel a soapbox orator or any other participant in public discussion to do so.

C. SECTION 104.38 UNCONSTITUTIONALLY PENALIZES PROTECTED SPEECH.

In the foregoing section, we treated § 104.38 as if it merely required a newspaper to devote a certain amount of space to the printing of candidates' statements, regardless of what it had printed in the past. Section 104.38, however, goes beyond a content-neutral requirement to print. It is a right-to-reply statute, which comes into operation only when a newspaper has attacked a public official seeking re-election or another candidate for public office. Thus here as in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), the Court is "adjudicating in an area which [lies]

[9] Many newspapers do print letters to the editor from members of the public. Publication of such letters in whole or in part is always subject to the editorial control of the newspaper. And it has never been thought that newspapers have any legal obligation to print such letters. The same considerations apply to the printing of advertisements. See cases cited at p. 24, *supra.*

close to seditious libel . . . ." *Curtis Pub. Co.* v. *Butts,* 388 U.S. 130, 153 (1967) (opinion of Harlan, J., for himself and Clark, Stewart & Fortas, J. J.).[10] Whether § 104.38 applies to any newspaper depends on its content: on whether it has attacked a candidate. The statute is therefore unconstitutional as a regulation of newspaper content: it penalizes protected speech, in violation of the First Amendment.

Section 104.38 is triggered by verbal attacks on candidates. It requires little space to show that such attacks are not merely constitutionally protected, but are at the core of First Amendment protection. In *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964), the Court said:

> "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

In *Near* v. *Minnesota,* 283 U.S. 697, 719-20 (1931), Mr. Chief Justice Hughes wrote for the Court:

> "While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile,

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[10] Criticism of candidates is entitled to the same First Amendment protection as criticism of public officials or of government. *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 271-72 (1971).

> the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press . . . ."

See also Mills v. *Alabama,* 384 U.S. 214, 218-19 (1966); *Rosenblatt* v. *Baer,* 383 U.S. 75, 85 (1966); *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964); *Watts* v. *United States,* 394 U.S. 705, 708 (1969); *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 271-72 (1971).

A newspaper attack on a political candidate loses its First Amendment protection only when it is false and defamatory and is published with "actual malice," *i.e.,* knowledge that it is false, or reckless disregard as to whether it is true or false. *New York Times Co.* v. *Sullivan, supra.* Florida has incorporated no such restriction in §104.38 so as to keep the statute within constitutional limits. The Complaint in the instant case did not even allege that any statement published by *The Miami Herald* was false or defamatory or was published with actual malice in the constitutional sense. Thus, the sanctions of §104.38 are triggered by any attack on a candidate, even one that is true, fair, objective, moderate and balanced, and thus fully protected by the First Amendment. Even if the newspaper has itself presented both sides of a controversy concerning a candidate, if it has included a criticism of him it must print his reply.

The sanctions themselves are penalties for criticism of a candidate. Under the decision below, if a news-

paper attacks a candidate and then does nothing more, it can be subjected to criminal and civil remedies for failure to print a reply. Truth was a defense even under the infamous Sedition Act of 1798, 1 Stat. 596,[11] but it is no defense under § 104.38. If a newspaper attacks a candidate, it must perforce relinquish its editorial independence, succumb to government compulsion, and print what the person designated by government orders it to print.

The provisions of § 104.38 maximize the burden it imposes on newspapers to which it applies. The amount and quality of space that must be devoted to a reply are identical to the amount and quality of the space devoted to the attack. Thus, the more space a newspaper devotes to criticism of a candidate, the more space it must yield to a reply, and the deeper is the bite of § 104.38 into its editorial freedom. The more front page or editorial page space a newspaper devotes to discussion of the defects in a candidate's character or record, the more such prime space it must sacrifice for a reply. The impact of this aspect of § 104.38 can be understood by considering the effect § 104.38 would have had if during the period from July to November, 1972, when Mr. Nixon was a candidate for re-election to the Presidency, he had been entitled to equal space on the front page and editorial page of *The Washington Post* to reply to every published attack on the record of his administration and his campaign staff with respect to Watergate and all other matters.

These consequences will be devastating for newspapers during election campaigns. The stock in trade

[11] The Sedition Act is discussed in *New York Times Co.* v. *Sullivan*, *supra*, at 273-76.

of candidates' speeches is attacks upon the personalities and records of their opponents. A newspaper which faithfully reports the substance of such attacks in its news columns must, under § 104.38, give equal and equally conspicuous space to replies from the attacked candidates. Of course, *their* speeches attacking *their* opponents will also generate rights to reply. A newspaper reporting on a campaign involving candidates for numerous offices will find itself swamped with replies which it must print. Large segments of its front page and editorial page will be usurped for this purpose. [12]

Under § 104.38, replies must be printed free of charge. The effect of this provision is to impose a discriminatory tax on political criticism. Every time a newspaper criticizes a political candidate, it must pay a tax of as much as the economic value of the newspaper space used for the attack. The tax goes to the criticized candidate in the form of a free right to reply. A candidate with a full campaign treasury who attacks an opponent with no money does not have to give a free and equal right to reply. Why must newspapers? Because they have exercised a constitutional right to criticize? That answer is plainly inadmissible. Because they have unique influence over the public? That cannot be assumed and has not been shown. See pp. 34-39, *infra*. Because they can afford to pay? That can not be assumed, as to some newspapers is certainly false, and, as limited to newspapers, the argument is plainly arbitrary and unreasonable. There is no good answer. Viewed as a tax

[12] This argument does not take into account the possibility that a reply will itself give rise to a right of reply, so that an extended (if not infinite) series of replies would have to be printed, all at the cost of the newspaper's editorial freedom.

on criticism by newspapers, § 104.38's imposition of a *free* right to reply is irrational and discriminatory, and therefore a violation of the First Amendment. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130, 150-51 (1967) (opinion of Harlan, J. for himself and Clark, Stewart and Fortas, J. J.) (state regulations may not "constitute a special burden on the press"); *Speiser* v. *Randall*, 357 U.S. 513, 529-30, 536 (1958) (Black, J., concurring; Douglas, J., concurring).[13]

The ultimate effect of § 104.38's imposition of a penalty for criticizing political candidates is to discourage such criticism. A newspaper that wants to maintain its editorial independence must avoid publishing criticism. If it decides to publish an attack on a candidate, it has a strong incentive to confine it to the smallest possible space. The statute introduces a new and alien factor into decisions on whether or not to publish: whether the article under consideration is worth the risk of having to print in equal and equally conspicuous space a reply *whose content cannot be known in advance*. Inevitably, the statute will take its toll of news and editorial copy. As the Court held in *New York Times Co.* v. *Sullivan*, *supra*, at 279, "The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments."

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[13] Of course, the press has no immunity from the general obligation of citizens to pay taxes. But as the Court held in *Murdock* v. *Pennsylvania*, *supra*, at 112, "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon." The same applies to a tax for the privilege of publishing an editorial critical of a political candidate.

D. SECTION 104.38 SERVES NO COMPELLING STATE INTEREST.

1. The Free Marketplace of Ideas Is Alive and Functioning Well, and Does Not Warrant State Intervention

There is much irony in the circumstance that in this, the first case testing the power of a state to compel a private newspaper to print an article, the Court is asked to approve that power with respect to a reply by a political candidate. For, of all the categories of people in this country, it is difficult to imagine a category more heavily covered by the press, and less in need of government coercion to obtain coverage, than political candidates. As Mr. Justice Harlan observed:

> "For me, it does seem quite clear that the public person has a greater likelihood of securing access to channels of communication sufficient to rebut falsehoods concerning him than do private individuals in this country who do not toil in the public spotlight." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 70 (1971) (dissenting opinion).

This observation applies with added force to candidates for public office during a political campaign period. During a campaign, the pages of newspapers are filled with news, feature stories and editorial opinion concerning candidates, their personalitities, activities, records, and positions on the issues. And of course campaign coverage is not limited to newspapers. Radio and television stations, local and national magazines, labor union, corporate and other organizational publications, and the candidates' own campaign staffs flood the public with reports, statements, analyses and commentary on all aspects of the campaign. The candidates themselves make speeches, hold rallies, attend meetings and other gatherings— all for the purpose and with the effect of making themselves and their

views known to the public. In *Curtis Pub. Co.* v. *Butts,* 388 U.S. 130, 155 (1967), the plurality assumed that both a football coach and a former Army general, without help from government coercion of the press, "commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to 'expose through discussion the falsehood and fallacies' of . . . defamatory statements." The same is true, *a fortiori,* of candidates for public office during a political campaign.

Although the Florida Supreme Court sought to uphold §104.38 under the state's power to provide for elections, it cannot seriously be suggested that there is a compelling state need to use coercion to gain public attention for political candidates during an election campaign. Certainly, the record in this case does not show any need sufficient to outweigh the evils of coercon discussed at pp. 17-26, 28-33, *supra.*

The Florida Supreme Court sought support for the decision below in the fact that the number of metropolitan newspapers in the United States has been declining in recent years. In a society whose marketplace of ideas was limited to metropolitan newspapers, that would indeed be a troubling circumstance. Happily, under the protection of the First Amendment, the genius of our people and the progress of technology have expanded our marketplace of ideas far beyond the metropolitian newspaper. Consider that monument to James Madison, the common newsstand. There the consumer of ideas can find, in addition to local metropolitan newspapers, several nationally distributed newspapers and even foreign newspapers, and local and national and perhaps even foreign magazines

of all descriptions. He may also find pamphlets, booklets and paperbound books which, due to technological advances, can now be published so quickly that they are an important source of ideas on even transitory matters of public concern. Beyond the newsstand there are, of course, the so-called "underground" newspapers, pamphlets, etc., which are distributed by individual hawkers, much as metropolitan newspapers were distributed years ago. Moreover, as this Court recognized in *United States* v. *CIO*, 335 U.S. 106 (1948), the publications of labor unions, corporations and other private associations are an important source of political ideas in modern America. Door-to-door distribution of leaflets and similar materials is also a time-honored medium of communication. See, *e.g.*, *Martin* v. *Struthers*, 319 U.S. 141 (1943). Films and theater also contribute to the public stock of "ideas." See, *e.g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501-02 (1952). Finally, the contemporary marketplace of ideas includes perhaps the most ubiquitous and influential media of all, television and radio. In 1970, approximately 95% of American homes—nearly 60 million households—contained at least one television set, and that set was turned on for an average of more than five and one-half hours each day."[14] The present number of sets is undoubtedly significantly larger.

A newspaper is only one communications medium in a vast and diverse array that together constitute an enormous multi-media marketplace of ideas. Today

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[14] See Hearings on H.R. 13721 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 7 (1970) (Statement of FCC Chairman, Dean Burch).

that marketplace is healthy and thriving. The emergence of the underground press, local city-oriented magazines, public broadcasting, and CATV in recent years testify to its dynamism. The decline in the number of metropolitan newspapers testifies to the same effect. As Joseph Schumpeter pointed out, any healthy competitive market will be characterized by a continuous process of "creative destruction", as sellers emerge, expand, contract or disappear in consequence of technological progress and changes in consumer preferences.[15] The disappearance of some metropolitan newspapers reflects not the growing importance of those that remain, but rather the decreasing importance of newspapers as such in the expanding marketplace of ideas as a whole. The decline in the number of metropolitan newspapers reflects not a contraction of the marketplace of ideas, but rather its expansion in other forms—magazines, broadcasting, organizational publications, etc.

Nor can § 104.38's blinkered focus on newspapers be justified on the ground that there is a particular need to compel coverage of local candidates and local campaign issues. Here, too, newspapers have no monopoly position. They compete for attention with local radio stations (of which there are likely to be a dozen or more in many areas), local television stations (commonly, three or more), local magazines, local organizational publications, local hawkers of underground publications, leaflets, handbills, etc., and the communications networks established by candidates themselves and their staffs.

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[15] See J. Schumpeter, Capitalism, Socialism and Democracy, 81-86 (1943).

In sum, the free market of ideas championed by Holmes and Brandeis, see *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Whitney* v. *California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring), is not a romantic myth, but a living, dynamic reality. Today, in 1974, the marketplace of ideas far exceeds, in both size and diversity, anything known to Madison and Jefferson, or even to Holmes and Brandeis. There are far more "sellers" of ideas, and they offer a wider range of wares, than have ever existed in the past.

Certainly, not every new idea or point of view commands an immediate mass audience. But the First Amendment does not itself ordain such instant access,[16] nor does it permit its achievement through government coercion of the print media.[17] Ideas must *earn* success. As Professor Kalven has written:

> "It is an insufficiently noticed aspect of the First Amendment that it contemplates the vigorous use of self-help by the opponents of given doctrines, ideas, and political positions. It is not the theory that all ideas and positions are entitled to flourish under freedom of discussion. It is rather then that they must survive and endure against hostile criticism. There is perhaps a paradox in that the suppression of speech by speech is part and parcel of the principal of freedom of speech.

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[16] *CBS* v. *Democratic National Committee*, 412 U.S. 94 (1973); *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967), cert. denied, 390 U.S. 920 (1968); *Chicago Joint Board ACWA* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971); *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Resident Participation of Denver, Inc.* v. *Love*, 322 F. Supp. 1100 (D. Colo. 1971).

[17] Opinion of the Justices, 298 N.E. 2d 829 (Mass. 1973).

> Indeed, one big reason why policy dictates that government keep its hands off communication is that, in this area, self-help of criticism is singularly effective. . . ." [18]

A system that dispensed with self-help and gave equal or even some automatic access to all ideas would not be a functioning marketplace. It would not foster the competition of ideas, which is the necessary catalyst of intellectual, moral, aesthetic, economic, political and social progress. It would not allocate communications resources in accordance with the expressed needs and wants of the public. It therefore would not serve the public.

The contemporary marketplace of ideas—ranging from *The Daily Rag* to the *New York Times,* from *Muhammed Speaks* to *Ms.,* from *Ramparts* to the *National Review,* and beyond—is open to broad diversity of ideas. And new publications, advancing new ideas, are started all the time. Some gradually win an audience and succeed. Others fail. That is the nature of a *free* and *competitive* market that is alive and functioning well. It is the kind of market contemplated in the First Amendment. It is the kind of market that exists today—without governmental intervention.

2. Section 104.38 Seeks To Vindicate Reputation, Not To Promote Public Debate

The Florida Supreme Court upheld § 104.38 in part because it thought it promoted public debate concerning candidates. That conclusion reflects a superficial analysis of the statute. If the purpose of § 104.38 is

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[18] Quoted in *CBS* v. *Democratic National Committee,* 412 U.S. 94, 153-54 (1973) (Douglas, J., concurring).

indeed to promote public debate about candidates, it achieves that purpose in an arbitrary and irrational manner.[19] Rather, the only purpose that coheres with the provisions of the statute is a purpose to vindicate the reputation of candidates attacked by newspapers. Section 104.38 is an inappropriate vehicle for developing new doctrine concerning access to the media.

If Florida had wanted to promote public debate concerning candidates, the rational approach would have been to encourage or otherwise provide for such debate, without regard to what any particular newspaper had published concerning the campaign. A sampling of methods was discussed at pp. 23-25, *supra*. But § 104.38 does not provide for a minimum quantity of discussion of candidates. Indeed, § 104.38 is of benefit only to the candidate who already has attracted sufficient attention to be attacked by a newspaper. It provides absolutely no benefit whatever to the candidate who has the greatest need of access—the candidate who is totally ignored.

If Florida had wanted to regulate newspapers with a view to ensuring that they provide "fair" campaign coverage, the rational approach (disregarding the First Amendment) would have been to require some rough equality in the treatment of candidates competing for the same office—*e.g.*, roughly equal space, or some kind of equality in editorial treatment. But § 104.38 provides for "fairness" only in a wholly arbitrary way: if a candidate is attacked he is entitled to a reply. He is entitled to a reply even if the newspaper has already

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[19] *Cf.*, *Mills* v. *Alabama*, 384 U.S. 214, 220 (1966), where a state, also asserting a power to provide for fair elections, adopted an irrational regulation of the press.

printed everything that can be said in his defense. If a newspaper does not attack a candidate, but totally misrepresents his positions on the issues, he is not entitled to a reply. Moreover, if the newspaper does not attack a candidate but strongly endorses and praises his opponent for wholly false and fraudulent reasons, the candidate is not entitled to a reply.

If Florida had wanted to promote some rough equality among candidates with respect to media access, it could have drafted a statute that provided access for candidates who need it, but not for candidates who do not. Section 104.38 applies to all candidates willy nilly. It applies to the candidate with a full campaign treasury and easy access to all media, as well as to the candidate with no funds who campaigns in relative obscurity.

Finally, § 104.38 gives a discriminatory advantage to incumbent candidates since it provides for a reply to charges of malfeasance in office and to attacks on official record, but not to attacks on conduct in an unofficial capacity.

This analysis does not show merely that § 104.38 deals with only part of an evil. It shows, rather, that the "evil" at which the statute was directed when enacted in 1913 and continues to be directed is not candidates' lack of access to the news media, but rather the injury to candidates' reputations resulting from press attacks upon them. In attempting to remedy that injury, § 104.38 happens incidentally to provide access in the situation where a candidate is attacked.

As the Florida Supreme Court pointed out, § 104.38 is comparable to a libel retraction statute. The similarity lies in the fact that both types of statute seek to

vindicate an interest in reputation. The operation of each is triggered exclusively by publication of a matter reflecting adversely on a person. But there the similarity ends, and distinctions of constitutional magnitude begin. First, under this Court's decisions, libel retraction statutes can constitutionally apply only to attacks that are false, defamatory, and published with "actual malice" as defined in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), to mean with knowledge of falsity or reckless disregard for truth. Section 104.38 is not so limited. It applies even where the attack on the candidate is true and non-defamatory. Second, libel retraction statutes do not affirmatively require the publication of a retraction. They merely provide that *if* a retraction is published the damages that may be recovered for the original libel are reduced in some way.[20] Section 104.38, by contrast, affirmatively requires the publication of a reply. Because of these two important distinctions, the constitutional analysis of a mandatory right-of-reply statute like § 104.38 is quite different from the analysis of a retraction statute. For example, a retraction statute would have none of the adverse effects on press independence discussed at pp. 17-23, *supra.*

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[20] Florida has a typical libel retraction statute, which provides:

"770.02 Correct, apology, or retraction by newspaper

If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages."

If § 104.38 were limited to apply only to false and defamatory attacks published with actual malice in the constitutional sense, this case would present the interesting question whether a state may provide for a mandatory right of reply as an alternative to damages as a remedy for libel. Since § 104.38 is not so limited that question is not presented. The question that is presented is whether Florida can provide a mandatory right of reply as a remedy to vindicate reputation against a published attack that is itself constitutionally protected. Under the *New York Times* line of cases,[21] a state may not award damages to vindicate a political candidate's reputation against constitutionally protected attacks. *A fortiori*, a state should not be permitted to trespass even further upon the editorial freedom of the press by requiring a newspaper to print a reply in order to vindicate reputation against a constitutionally protected attack.

3. The Premises of the Fairness Doctrine in Broadcasting Have No Application to the Print Media

The Florida Supreme Court sought support for its decision below in an analogy to the fairness doctrine in broadcasting, which this Court upheld in *Red Lion*

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[21] See *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Henry* v. *Collins*, 380 U.S. 356 (1965); *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966); *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130 (1967); *Associated Press* v. *Walker*, 388 U.S. 130 (1967); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81 (1967); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); *Greenbelt Coop. Pub. Ass'n* v. *Bresler*, 398 U.S. 6 (1970); *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971). See also *Linn* v. *Plant Guard Workers*, 383 U.S. 52 (1966); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Pickering* v. *Board of Educ.*, 391 U.S. 163 (1968).

Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969). However, the considerations which led this Court to approve the fairness doctrine in the context of broadcasting have no application to the print media, as the Court recognized in *Red Lion* and in *CBS* v. *Democratic National Committee*, 412 U.S. 94 (1973).

The First Amendment analysis in *Red Lion* began with the proposition that a broadcast "licensee has no constitutional right to be the one to hold the license." 395 U.S., at 389. Of course, no scheme of licensing of any sort could possibly be applied to the print media. Licensing of the press is the oldest, most fundamental abuse of freedom of expression which the English-speaking peoples have experienced. Milton hurled the thunderbolts of *Aeropagitica* against it. Schemes of prior control of the print media not amounting to the kind of systematic licensing applied to broadcasting have been roundly condemned by this Court. See, *e.g.*, *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971).

The reason why licensing is constitutionally acceptable in broadcasting derives from the unique technology of that medium:

> "When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communicatons if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a

> tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had . . . .
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> It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished which made necessary the enactment of the Radio Act of 1927 and the Communciations Act of 1934 . . . . [I]t was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few." 395 U.S., at 387-88.

Of course, nothing remotely comparable to this clear technological necessity exists in the field of print communications. Consequently, there is absolutely no possible basis for the Government ever to tell a publisher that he may not publish because there is "room for only a few."

From the fact that the Government chooses which applicants shall have a license to broadcast, certain obligations attach to a broadcasting license. Where the Government confers an exclusive power, it may, and in some circumstances must, condition the power so that it is exercised in a manner that protects the legitimate interests of those excluded from the power and those affected by it. *See, e.g., Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1945) (duty of fair representation). As the Court held in *Red Lion*:

> "A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself

as a proxy or fiduciary with obligations to present those views and voices which would otherwise, by necessity, be barred from the airwaves.

". . . Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.

"Rather than confer frequency monopolies on a relatively small number of licensees, . . . the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week." 395 U.S., at 389-91.

The very premise of the imposition of this duty to share—receipt of monopoly from the Government—is totally inapplicable to the print media. They do not receive their right to print from the Government. It is an inherent right of the people, protected against governmental abridgment by the First Amendment. No such constitutional protection attaches to broadcasting: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." 395 U.S., at 388.

These considerations underlying the unique constitutional tolerance of governmental licensing and regulation of broadcasting were reaffirmed in *CBS* v. *Democratic National Committee,* 412 U.S. 94 (1973), where the Court held that there is no First Amendment right to purchase broadcasting time for public issue messages. The Court again underscored the unique characteristics of the broadcast media. 412 U.S., at 101. See also, 412 U.S., at 184 (Brennan, J., dissenting).

The Court noted "the reality that in a very real sense listeners and viewers constitute 'a captive audience,' " 412 U.S., at 127, whereas readers are not, 412 U.S., at 128. The plurality decisively distinguished the constitutional position of a newspaper published from that of a broadcast licensee:

> "The tensions inherent in such a regulatory structure emerge more clearly when we compare a private newspaper with a broadcast licensee. The power of a privately owned newspaper to advance its own political, social and economic views is bounded by only the two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers. A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper. A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.' " 412 U.S., at 117-18.

Mr. Justice Brennan and Mr. Justice Marshall, dissenting, were of the same view. See 412 U.S., n.12 at 182.

In light of the basis on which *Red Lion* was decided, there can be no reasoned extension of that decision to the imposition on newspapers of a duty to print. Indeed, the reasoning of both *Red Lion* and *CBS* makes clear that no such extension is possible. The fairness doctrine is an outgrowth of technological conditions peculiar to broadcasting; those conditions provide its sole constitutional justification. No such conditions are present in the field of print communications.

The Florida Supreme Court spoke loosely of "monopoly" conditions justifying imposition of a duty to print. Even if such a monopoly existed and violated the

antitrust laws, there would be no justification for imposing a duty to print: for the monopoly would not be technologically determined, and anyone with a printing press or a mimeograph machine could enter and compete and spread his ideas as far as their merit would carry them. But there is no such monopoly of communications, as we showed at pp. 34-39, *supra*. Moreover, the application of § 104.38 is not limited to monopolists.

Finally, there is nothing in the technology of print communications remotely analogous to the conditions in broadcasting. New newspapers, new magazines, new books, new pamphlets are published every year. It is true that there is no significant expansion, and indeed some contraction, in the number of large metropolitan newspapers. But there is nothing to show that the contraction results from technological factors rather than simple consumer preferences for other media, both in broadcasting and in print.[22]

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[22] Certainly the fact that newspapers benefit from second-class postage rates, 39 CFR § 132, and from a limited antitrust exemption, 15 U.S.C. §§ 1801 *et seq.*, does not make newspapers a part of government and as such subject to the Equal Protection Clause and to a fairness doctrine as an element thereof. See *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972). If newspapers *were* subject to the Equal Protection Clause, they would be required to do far more than merely print the replies of criticized political candidates. They, like all other governmental forums, would have to give equal access to everyone who seeks it. The editorial freedom and independence of newspapers would totally vanish as they became common carriers for all ideas seeking a ride. Perhaps not *all* ideas—for, as agents of the state, newspapers probably could not advance religious, partisan or discriminatory ideas. Plainly, this is not what the First Amendment contemplates. See *CBS* v. *Democratic National Committee*, 412 U.S. 94, 142-43 (1973) (Stewart, J., concurring); *id.*, 149-50 (Douglas, J., concurring).

4. Approval of § 104.38 Would Not Promote Free Debate, But Restrict It

Professor Emerson has written:

> "[A]ny effort to solve our broader problems of a monopoly press by forcing newspapers to cover all 'newsworthy' events and print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity." T. Emerson, The System of Freedom of Expression, 671 (1970).

Statutes like § 104.38 might well destroy publications whose success depends on appealing to a select readership with a particular approach or point of view. In this country, there are newspapers of the right, and newspapers of the left (old left, new left, and just plain left), newspapers that are moderate, and newspapers that are inflammatory. The First Amendment makes room for them all. If each is now required to "balance" its news coverage and editorial position by printing opposing points of view, the diversity among them will certainly diminish, and may in some cases disappear altogether. The diversity and breadth of public debate will be the chief victim.[23]

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[23] In *Brandywine-Main Line Radio, Inc.* v. *FCC*, 473 F.2d 16 (D.D.C. 1972) cert. denied, 412 U.S. 922 (1973), the FCC denied renewal of a radio license, in part because of violations of the fairness doctrine. The court affirmed. Judge Bazelon, dissenting, pointed out: "WXUR was no doubt devoted to a particular religious and political philosophy; but it was also a radio station devoted to speaking out and stirring debate on controversial issues. The station was purchased by Faith Theological Seminary to propagate a viewpoint which was not being heard in the greater Philadelphia area. . . . The Commission's strict rendering of fairness requirements . . . has removed WXUR from the air. This has deprived the listening public not only of a viewpoint but also of

Statutes like § 104.38 would introduce petty administrators and court officers into the editorial offices of newspapers. For they would be accompanied by regutions, investigations and injunctions. Newspaper copy might have to be cleared with officials to determine whether it gives rise to a right of reply. Other copy might have to receive official clearance under statutes, ordinances, rules, regulations, orders and injunctions requiring that newspaper articles and editorials be "fair" or "balanced" or "present both sides."

Certainly under the regime of the fairness doctrine and similar requirements, broadcasting has, as a practical matter, been restricted to presentation of a relatively small range of reasonably moderate points of view. Certainly, broadcasting does not reflect the full range of opinion and ideas that can be found in the print media. Nor, under the regime of the personal attack aspect of the fairness doctrine, see generally *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), have the broadcast media developed a record of crusading journalism and exposure of corruption, fraud, and other wrongdoing remotely comparable to the record of the print media.

The concerns expressed here are not idle. Senator McClellan has already indicated on the floor of the Senate that if this Court upholds § 104.38 he will introduce similar federal legislation.[24] Affirmance in this

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robust debate on innumerable controversial issues. It is beyond dispute that the public has *lost* access to information and ideas. This is not a loss to be taken lightly, however unpopular or disruptive we might judge these ideas to be." 473 F.2d, at 69-70.

[24] 120 Cong. Rec. S1105 (daily ed., Feb. 4, 1974).

case would signal to governments at all levels throughout the country that it is open season on the press.

If a statute like § 104.38 were extended to magazines, which have never been thought to have a constitutional status different from that of newspapers, the resulting standardization of the formerly free press would be even more striking. Magazines such as *The New Republic, I. F. Stone's Weekly, Ramparts, The Public Interest,* and *The National Review* simply could not exist as we have known them. Whether they, or smaller publications having similar appeals, could exist at all is doubtful.

Mr. Justice Brandeis warned: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead* v. *United States,* 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). Even the wealthiest and most independent newspapers cannot and will not for long print double editions—the edition they want to print plus the edition the government tells them they must print. In the face of such a requirement, newspapers will inevitably blunt their swords and use them sparingly. Public debate will not have been promoted, but restricted. The vigorous canvassing of the merits of public men, to which Madison proudly referred, will not be a continuing reality, but will have become an historical curiosity.

II. UNDER THE FIRST AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, § 104.38 IS UNCONSTITUTIONALLY VAGUE

Statutory terms critical to the effective scope of § 104.38 are vague, and have not been defined by the Florida Supreme Court.

The statute protects a "candidate." But who is a candidate? Is a politician who has not formally announced his candidacy but who is actively seeking support and contributions a "candidate" entitled to the protection of § 104.38? Is a politician who is not actively seeking support, but who is "testing the wind" a "candidate"? Is a person for whose nomination a "draft" movement exists a "candidate"? Or a person who has announced his candidacy but has not met the legal qualifications for candidacy?

Section 104.38 applies when a newspaper anywhere in its columns "assails the personal character" of a candidate or "charges said candidate with malfeasance or misfeasance in office" or "otherwise attacks his official record." What is an assault on personal character? What is a charge of malfeasance? What is an attack on an official record? Does the statute apply to a news article reporting that a legislator seeking re-election failed to vote on certain matters? or had dinner with a lobbyist? or accepted a contribution from a special interest? or votes on matters affecting his own private business interests? or failed to file income tax returns? or is the recipient of an agricultural subsidy? or was arrested for a traffic violation? In the case of a governor seeking re-election, does § 104.38 require the printing of a reply to a news article analyzing deficiencies in state programs during his administration? or reporting that several of his close associates have received special favors from the state, or have been

indicted? Does it apply to an article quoting inconsistent statements on the issues which a candidate has made during the course of a campaign? Does it apply to an article reviewing previous public statements a candidate has made and which are now an embarrassment to him? Does it apply to a statement that Black leaders regard him as a racist, or that influential businessmen regard him as soft on communism? Does it apply to the principal statement in this case: that a candidate while serving as a union leader violated a no-strike law?

Section 104.38 applies only to newspapers. It clearly applies to large metropolitan daily newspapers of general circulation. Does it also apply to small weekly newspapers? Does it apply to monthly publications printed on newsprint? Does it apply to trade or organizational publications? To newsletters?

What is a "reply" that must be printed under § 104.38. The Florida Supreme Court did hold that the statutory term "any reply" refers only to replies that are "wholly responsive to the charge made in the editorial or other article in the newspaper being replied to and further that such reply will be neither libelous nor slanderous (sic) of the publication nor anyone else, nor vulgar nor profane." But the term "responsive" provides no reasonable guidance to editors, whose view of what is "responsive" may be quite different from a candidate's.[25]

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[25] In the instant case, for example, it is far from clear that Mr. Tornillo's proposed replies are responsive to *The Miami Herald's* criticism of him. Each reply consists in large part of a recitation of good deeds on the part of the labor union which Mr. Tornillo headed. It is strongly arguable that these lists have no relevance to the substance of the criticism, which was that Mr. Tornillo defied state law by leading a teachers' strike.

If § 104.38 should be widely invoked during the heat of a political campaign, these will become serious practical problems for newspapers. The uncertainties can be removed in three ways—by piecemeal litigation, probably in the form of temporary restraining order or preliminary injunction proceedings during the campaign; by an army of petty officials giving advisory opinions on what a newspaper may "freely" print (subject, of course, to judicial review); or by efforts on the part of newspapers to steer far wide of the statute's scope in their news articles and editorials *Cf. Speiser* v. *Randall,* 357 U.S. 513, 526 (1958).

This Court on many occasions has condemned statutes and other laws that regulate speech by terms that are of vague and uncertain meaning. See, *e.g., Herndon* v. *Lowry,* 301 U.S. 242 (1937); *Winters* v. *New York,* 333 U.S. 507 (1948); *Cramp* v. *Bd. of Public Instruction,* 368 U.S. 278 (1961); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Ashton* v. *Kentucky,* 384 U.S. 195 (1966). As Mr. Chief Justice Hughes wrote for the Court in *Stromberg* v. *California,* 283 U.S. 359, 369 (1931):

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

The vices of vagueness are too well known to require restatement here.

It suffices here to note that § 104.38 carries both criminal and civil sanctions; that it regulates speech concerning political candidates, their official records and qualifications for public office; that there are no expeditious means for eliminating the statutory vagueness; and that this Court's standards for statutory clarity apply with particular force, under the decisions just cited, to regulations of this character. In these circumstances, § 104.38 is unconstitutionally vague.

III. SECTION 104.38 TAKES A NEWSPAPER'S PROPERTY WITHOUT COMPENSATION, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Where § 104.38 applies, it requires that a newspaper give space in its columns to a political candidate for a reply. Neither the state nor the candidate pays the newspaper any compensation whatever for the space occupied by the candidate's reply. Under prior decisions of this Court § 104.38 takes private property —the newspaper space—without compensation, in violation of the Due Process Clause of the Fourteenth Amendment. [26]

The decisions of this Court on when state action constitutes a "taking" for which compensation must be paid are not easily reconciled. See, *e.g.*, Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967). But the clearest case of a taking, and one about which there has been no disagreement, is that where the state physically occupies the private property, and ousts the owner from

[26] The Florida Supreme Court considered and rejected this claim.

it. See, e.g., *Pumpelly* v. *Green Bay Co.*, 13 Wall. (80 U.S.) 166 (1871); As Professor Michelman has written, "The one incontestable case for compensation (short of formal expropriation) seems to occur when the government brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership." 80 Harv. L. Rev., at 1184.

In this case, § 104.38 authorizes candidates' replies to physically occupy newspaper space which previously was under private ownership. That space has very significant economic value, whether for news articles or for advertising.

Thus, under § 104.38 the State of Florida, through its designee, the political candidate, plants its flag in the column space of a privately owned newspaper. The appropriation of that space is as much a taking of property, as would be the similar appropriation of land or of any other business man's stock in trade. Section 104.38 presents the paradigm case of a taking of private property without compensation. See *Delaware, L. & W. R. Co.* v. *Town of Morristown*, 276 U.S. 182 (1928), where the Court held that the town had "taken" railroad property when it declared railroad land reserved for a private taxi stand to be open to all taxis, even though the railroad, as a common carrier, owed its passengers a duty of providing a suitable way to reach and leave the station, and even though the railroad's taxi stand was generally subject to the town's police power. Since a newspaper is not a common carrier, the instant case is *a fortiori*.

In some cases, this Court has held that an injury to a property interest resulting as an incidental consequence of a generally valid regulation was not a taking requiring payment of compensation. See, *e.g., United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962). But § 104.38 is not a general regulation which incidentally has an adverse effect on newspaper property. Its sole purpose is to take newspaper property and give it to someone else. Section 104.38 cannot be analogized to a regulation that broadly bans certain activities and thereby incidentally diminishes the value of certain property previously devoted to those activities, see, *e.g., Mugler* v. *Kansas*, 123 U.S. 623 (1887). Section 104.38 does not ban the use of the newspaper space it affects; rather, it wholly divests the newspaper of its right to the use of the space and revests that right in a political candidate. The regulatory statutes approved by this Court have not operated in this way.

Moreover, the regulatory statutes generally were directed at uses of private property which were thought to be in some way "noxious" or otherwise adverse to the rights of others, see, *e.g., Mugler* v. *Kansas, supra; Miller* v. *Schoene*, 276 U.S. 272 (1928); *Fertilizing Co.* v. *Hyde Park*, 97 U.S 659 (1878); *Gardner* v. *Michigan*, 199 U.S. 325 (1905), or were so broad in scope and the economic consequences so massive and widespread that the effect on any individual property holder was truly incidental in comparison to the whole and a requirement to pay compensation to all would have made impossible a highly beneficent public project, see, *e.g., Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). But

§104.38 does not regulate a "noxious" use of newspaper space—a newspaper's exercise of its constitutional right to criticize a candidate for public office can hardly be so characterized. Nor is the statute so broad in scope that the effect on newspapers as a class or on any given newspaper is merely incidental—the statute is directed exclusively at newspapers. Nor would a requirement of compensation to be paid by the state or by the candidates make a reply statute impossible of execution as a practical matter.

To the extent that diminution of the economic value of the affected property is a criterion for deciding whether a taking has occurred, see, *e.g., Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922), it is satisfied here. The economic value to the newspaper of the space occupied by the reply pursuant to § 104.38 is totally destroyed. That the remander of the newspaper is unaffected is no more relevant than is the fact that if the government takes half a man's land for a post office he retains the other half. Compensation must be paid for what has been taken.

The fact that § 104.38 may serve a public purpose has no effect on a claim for just compensation. As Mr. Justice Holmes wrote for the Court in *Pennsylvania Coal Co.* v. *Mahon, supra,* at 415-16, "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." And as the Court said in *Armstrong* v.

United States, 364 U.S. 40, 49 (1960), "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." If, as contended, § 104.38 does serve the public purpose of educating the electorate, the cost should be borne by the public (or by the political candidates particularly benefitted), not by newspapers.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the decision of the Florida Supreme Court should be reversed and the case remanded with directions to reinstate the judgment of the Circuit Court for Dade County dismissing the Complaint.

Respectfully submitted,

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November 1, 1973

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Tornillo, Jr. v. *The Miami Herald*

Dear Mr. Cooper:

In response to your request, pursuant to Rule 41(1) of the Rules of the United States Supreme Court, on behalf of the Miami Herald, we hereby consent to the filing in that Court of an Amicus Curiae Brief in this case by the Washington Post Company.

Sincerely,

/s/ JAMES W. BEASLEY
James W. Beasley

JWB:mh

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November 19, 1973

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Re: Tornillo v. Miami Herald

Dear Mr. Cooper:

As counsel for the above captioned respondent, you are hereby given permission to file your brief amicus curiae on behalf of the Washington Post in the above captioned matter.

Very truly yours,

/s/ TOBIAS SIMON
Tobias Simon

TS:kk

Certificate of Service

I hereby certify that three printed copies of the foregoing Brief of the Washington Post Company, Amicus Curiae, in Support of Reversal, were mailed, first-class air mail, postage prepaid, this 28th day of February, 1974, to each of the following:

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/s/ TERRY M. ROSE
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